

PARTIES: THE QUEEN

v

PETER LAJCIAK

TITLE OF COURT: SUPREME COURT OF THE
NORTHERN TERRITORY

JURISDICTION: SUPREME COURT OF THE
NORTHERN TERRITORY
exercising TERRITORY
JURISDICTION

FILE NO: 9709672

DELIVERED: 8 December 1998

HEARING DATES: 9, 10 November 1998

JUDGMENT OF: THOMAS J

REPRESENTATION:

Counsel:

Crown: J. Adams
Defendant: J. Lawrence

Solicitors:

Crown: Director of Public Prosecutions
Defendant: De Silva Hebron

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(tho98022)

IN THE SUPREME COURT
OF THE NORTHERN TERRITORY
OF AUSTRALIA
AT DARWIN

No. 9709672

BETWEEN:

THE QUEEN

AND:

PETER LAJCIAK

CORAM: THOMAS J

REASONS FOR RULING

(Delivered 8 December 1998)

The accused has entered a plea of not guilty to two charges on indictment,
that:

1) On 25 April 1997 at Palmerston in the Northern Territory of
Australia had sexual intercourse with Iveta Lajciak without her consent.
Section 192(3) of the *Criminal Code*.

2) On 25 April 1997 at Palmerston in the Northern Territory of
Australia deprived Iveta Lajciak of her personal liberty.
Section 196 of the *Criminal Code*.

This ruling is in respect of an application by the accused pursuant to s26L of the *Evidence Act* challenging the admissibility of the record of interview conducted with the accused on 25 April 1997 on the trial of the accused.

The record of interview commenced at 1.40 pm on 25 April 1997 at the Peter McAulay Centre.

The basis of the challenge is that there is a breach of s142(1)(b) of the *Police Administration Act* which provides as follows:

“(1) Subject to section 143, evidence of a confession or admission made to a member of the Police Force by a person suspected of having committed a relevant offence is not admissible as part of the prosecution case in proceedings for a relevant offence unless –

(b) where the confession or admission was made during questioning, the questioning and anything said by the person was electronically recorded,

and the electronic recording is available to be tendered in evidence.”

In summary, the challenge made by Mr Lawrence, on behalf of the accused, is based on the defence assertion that prior to commencing the formal record of interview, the accused was questioned by police and he gave a relatively full version of what had occurred. These questions and answers were not recorded, nor were the matters said by the accused formally put to him in the formal record of interview.

Mr Lawrence, for the accused, relies on the decision of *Pollard v The Queen* (1992) 176 CLR 177 in support of his submission that, in the exercise

of my discretion, the record of interview should be excluded either because of the potential unfairness to the accused because of his prior admissions to police or on the grounds of public policy.

The background to this application is as follows:

The offences which are the subject of the indictment are alleged to have occurred at approximately 4.00 am on 25 April 1997 at the home of the accused, and his then wife Iveta Lajciak, 20 Bailey Circuit, Driver.

At approximately 5.00 am on that date, Iveta Lajciak left the home and reported the incident to police at the Peter McAulay Centre. Mrs Lajciak was spoken to by police and also attended for a medical examination.

Mrs Lajciak gave police permission to search the premises at 20 Bailey Circuit, Driver.

Constable Harris, Sergeant Fred Huysse and Sergeant Greg Lade then set out to locate the accused, Peter Lajciak. They first travelled to 20 Bailey Circuit, Driver. There was no one at home. Peter Lajciak was located a short distance away at the home of his parents at 28 Woodroffe Avenue, Palmerston. Sergeant Huysse spoke to the accused and asked him to identify himself. Sergeant Huysse then arrested the accused and told him he was under arrest for having sexual intercourse without consent. Peter Lajciak gave evidence of the

fact (t/p 73) that at the time of his arrest he was cautioned as to his right to speak or remain silent:

“When you were arrested by Sergeant Huysse did he warn you that you didn’t have to say anything?---Yes.

And did he say that anything you did say could be used in evidence against you?---Yes, I think so. Yeah.

Well you think so?---Well I – yeah – he – he read when he arrested me he read – read me my rights. Yes.

You understood them, did you?---Well, yes.”

Peter Lajciak was then taken by police to 20 Bailey Circuit, Driver.

On arrival at 20 Bailey Circuit, Driver, Sergeant Huysse had a conversation with the accused which was tape recorded. During this conversation, the transcript of which is Exhibit P2 on this application, Sergeant Huysse again cautioned the accused and asked him if he wanted police to tell either his parents or his brother of his whereabouts. Mr Lajciak declined the offer saying “not at this stage, maybe at a later stage”. In this conversation he also confirmed that he had given police his consent to look through his house at 20 Bailey Circuit, Driver. In his evidence to this Court, Mr Lajciak gave evidence confirming the conversation with Sergeant Huysse and stated (t/p 73) that he knew he did not have to say anything to the police unless he wanted to.

This conversation concluded at 10.51 am.

Mr Lajciak gave evidence that he pointed out the bedroom in the house. It is his evidence he pointed out the handcuffs and the belt.

I accept the evidence of Sergeant Huysse (t/p 59) that after the arrest of Mr Lajciak, either Sergeant Huysse or Constable Harris explained to Mr Lajciak the outline of the allegation by his wife that he had raped her. Mr Lajciak was also informed that he would be taken back to Peter McAulay Centre and police would talk to him later.

Mr Lajciak was taken back to the Peter McAulay Centre and was placed in the cells at the Watchhouse at 12.26 pm.

The investigating police officers did not attend again on Mr Lajciak until 1.21 pm when Constable Harris went down to the Watchhouse, took him out of his cell and escorted him to the CIB office. The formal record of interview commenced at 1.40 pm.

The challenge by the accused to the admissibility of the record of interview is centred on what occurred in the 19 minutes between the time he was taken from the cell in the Watchhouse at 1.21 pm, to the commencement of the record of interview at 1.40 pm.

For this reason I go into some detail as to my findings on the evidence given by Constable Harris, Sergeant Huysse and Peter Lajciak as to what occurred in that 19 minutes.

It is relevant to note that the Crown were not seeking on the trial of the accused to adduce any evidence as to any conversation between police and Mr Lajciak after he was taken from the watchhouse at 1.21pm on 25 April 1997 until the commencement of the formal record of interview at 1.40pm the same date. The reason being that no tape recording was made of any such conversation and no notes were made by police of any conversation.

Constable Harris gave evidence that she escorted Mr Lajciak from the cell in the Watchhouse a distance of approximately 30 metres to interview room No. 2 in the CIB office. The reason he was taken to interview room No. 2 is because there is a telephone there which Mr Lajciak could use to communicate with his family. There is no telephone access in the interview room where the formal record of interview was to be conducted.

A conversation then took place in interview room No. 2 between Constable Harris and Mr Lajciak in the presence of Sergeant Huysse. Constable Harris explained to the accused that police wanted to interview him about the complaint made by his wife (t/p 24). In order to satisfy herself that Mr Lajciak could understand English sufficiently, Constable Harris asked the accused some questions about how long he had been in the country and whether he could understand her. Constable Harris also offered Mr Lajciak the use of the telephone so that if he wished he could telephone his parents. Constable Harris told Mr Lajciak that his parents knew he was at the police station and they were a bit concerned about him and he was welcome to telephone them. Mr Lajciak replied that he did not want to telephone them at

that point in time. Constable Harris also asked the accused if he wanted a cup of coffee or wanted to go to the toilet. The accused declined.

I accept the evidence of Constable Harris that during this time Mr Lajciak was attempting to explain certain things to the police. He was saying words to the effect “how can she do this” and “she was out all night”. Constable Harris received the impression that Mr Lajciak was surprised a complaint had been made at all. I accept the evidence given by Constable Harris that she told Mr Lajciak they would talk about those matters later.

(Under cross-examination Constable Harris stated she told the accused to “just wait”, it was not the right time yet and they would have to do a formal record of interview. Constable Harris gave evidence that Sergeant Huysse also said to Mr Lajciak “Look, just hold off, wait. This is not the right time.” (t/p 45)).

After Mr Lajciak indicated he did not wish to telephone his parents, both Constable Harris and Sergeant Huysse left interview room No. 2. Constable Harris made herself a cup of coffee. She also obtained some tapes to video the record of interview and gathered up the paperwork which is to be completed when a record of interview is conducted.

Constable Harris and Sergeant Huysse then moved the accused to the interview room where the video facilities are available, a distance along a corridor of some 30 metres.

In this interview room, Constable Harris unsealed the tapes and placed them in the machine ready to start the record of interview. She also explained the procedure to be adopted in the course of the record of interview. Mr Lajciak wanted his glasses which were in his property at the Watchhouse. Sergeant Huysse left the interview room and obtained the glasses for Mr Lajciak from his property at the Watchhouse.

At 1.40 pm the formal record of interview began.

The evidence of Constable Harris is substantially corroborated by Sergeant Huysse in respect of the period of time between 1.21 pm and 1.40 pm.

Sergeant Huysse gave evidence that Constable Harris escorted the accused from the Watchhouse to interview room No. 2 and asked the accused if he wished to telephone his parents. It is Sergeant Huysse's evidence that the accused was agitated and saying a lot of things. He was saying things such as "I don't know why she's doing this? It's her fault, she's been out all night." Sergeant Huysse told him to keep what he was saying until later and to listen to Constable Harris who was attempting to explain the procedure and what was about to happen. Sergeant Huysse stated Mr Lajciak did not seem to be paying any attention to Constable Harris. Sergeant Huysse gave evidence that a decision to conduct a formal record of interview with the accused had been made at the time of his arrest (t/p 49). Sergeant Huysse states he and Constable Harris left the interview room to collect the tapes and the exhibits.

They returned to interview room No. 2 and escorted Mr Lajciak to the room where the video facilities were available to conduct a formal record of interview. On Sergeant Huysse's evidence this was some 40 metres away. When they arrived in this interview room, the accused asked for his glasses. Sergeant Huysse left, went down to the Watchhouse, obtained the glasses and returned to the interview room. The formal record of interview then commenced.

Under cross-examination, Sergeant Huysse agreed there were hand held tape recorders which were accessible for use by the police officers in interview room No. 2 and agreed the conversation in interview room No. 2 could have been taped (t/p 55).

Sergeant Huysse stated he did not recall any questions being asked of the accused prior to the commencement of the formal record of interview. Sergeant Huysse stated the accused was relating his version of events and Sergeant Huysse cut in and told him to save it because they were going to have an interview and he would have his chance then (t/p 64). Sergeant Huysse said the account being given by Mr Lajciak was not in any detail.

The evidence of Mr Lajciak conflicts on one important issue with the evidence of Constable Harris and Sergeant Huysse. It is Mr Lajciak's evidence that after he was ushered into the smaller interview room, both Constable Harris and Sergeant Huysse came in and asked him to tell them what happened earlier that morning. He said he tried to tell them the whole story.

The woman officer was questioning him. When he started to go into detail Sergeant Huysse told him to leave that for later; they didn't want to hear the details, just the general background. It is Mr Lajciak's evidence that he told the police everything that happened that morning, including the problems that he had with his wife earlier that week. He had told them that the night before she was out late, that he went to the bathroom when she came home and then told them what happened, including having sexual intercourse and said that the only thing he had done wrong was to try to have anal intercourse. Mr Lajciak stated Constable Harris asked him a few questions like "Did she say no at any stage?" and asked whether the accused had restrained her. Mr Lajciak could not remember the exact questions but said the conversation lasted about 10 minutes. He said after this they went to another interview room where he had another interview which was recorded and during which he was shown certain items.

Mr Lajciak gave evidence he had been arrested again after this incident and he was a bit confused as to whether it was a man or a woman who on this occasion escorted him from the watchhouse cell to the interview room. Mr Lajciak gave the following answer in cross-examination (t/p 80):

"Well, I'm just asking if you knew what was going to happen or you did not know what was going to happen?---Well, when they put me in the room, I thought they going to ask me questions.

Did Detective Harris tell you she was going to ask you questions?---
Before we went to the office?

In that room did she tell you she was going to ask you questions?---I can't really – I don't remember. I can't say. All I remember they asking me questions. They – well, they didn't really ask me questions they – they

just – we came in and they asked me if I could tell them what happened that morning and then I – I told them – I told them that I better tell them what happened from the beginning and I told them the story.”

Mr Lajciak agreed that when he started to go into detail Sergeant Huysse said on a couple of occasions “save it up for the tape”. Mr Lajciak agreed at the time of the record of interview he was angry with his wife (t/p 84). He gave evidence he does not remember when his glasses were returned to him.

The essential difference between the evidence of the three witnesses is that Constable Harris states that at no time did she question the accused from the time she took him from the Watchhouse until the commencement of the formal record of interview conducted in interview room No. 1. Sergeant Huysse says no questions were asked in his presence during this time. On the evidence of Mr Lajciak he was asked a series of questions by Constable Harris in the presence of Sergeant Huysse (t/p 71).

I do not accept the evidence of Mr Lajciak on this aspect. I prefer the evidence of Constable Harris, supported on important aspects by the evidence of Sergeant Huysse, that during this crucial 19 minute period no questions were put to Mr Lajciak. I accept the evidence of the police officers that Mr Lajciak was agitated and distressed and that he was attempting to tell them his version of events despite the fact that both police officers told him to hold his explanations for a later time. I accept the evidence of Sergeant Huysse that he told Mr Lajciak to save his explanation for later when a formal record of interview would be conducted. I am satisfied Constable Harris was attempting to explain the procedure to be adopted by police on the formal record of

interview. However, Mr Lajciak, in his state of agitation, did not want to listen but wanted to pour out his version of the morning's events.

I am satisfied that both Constable Harris and Sergeant Huysse intervened to prevent Mr Lajciak from giving his version of events until a formal record of interview could be commenced.

It is relevant to note that when he entered interview room No. 2, Mr Lajciak had been cautioned on two occasions earlier that day and on his own evidence was well aware of his right to either speak or remain silent.

There is really no issue between the Crown and the defence that the record of interview was voluntary in the sense referred to in *McDermott v The Queen*. (1948) 76 CLR 501. The accused, when he gave the record of interview, was well aware he had a choice to either speak to police or remain silent. He elected to answer police questions on a formal record of interview.

The Crown has discharged the onus of proof upon it to establish that the record of interview was made voluntarily.

On my findings of fact, the police are not in breach of s142(1)(b) of the *Police Administration Act*. The Crown do not seek to adduce evidence of what was said by the accused between 1.21 pm and 1.40 pm. I am satisfied the accused was not questioned by police during this time and that the police tried on several occasions to stop him from recounting his version until the formal

record of interview commenced. The accused was in such a state of agitation that he continued to talk despite police efforts to advise him to save his explanations for later. His own evidence is contradictory as he states initially (t/p 71) that he went into a considerable amount of detail in relaying his version of events and later gives evidence (t/p 83) that police stopped him from going into detail. At the time there was no reason for Mr Lajciak to distinguish exactly what was said in interview room No. 2 with what occurred later in the formal record of interview. Not unexpectedly, Mr Lajciak did not at that time or at any subsequent time, make notes of the conversation with police.

I have come to the conclusion, on the evidence before me, that because of Mr Lajciak's state of distress and agitation at the time, his strong desire to tell the police his version of events, and with the passage of time that has elapsed since the interview occurred, Mr Lajciak has become confused in his own mind about when the questioning actually started. I do not accept he has given an accurate account of what occurred between 1.21 pm and 1.40 pm.

Mr Lawrence, on behalf of the accused, submitted that the 19 minutes has not been satisfactorily accounted for and this would support a finding that police used this time to question the accused. It is I think relevant to set out the number of things that did occur in this 19 minute period. They include:

- Constable Harris escorted Mr Lajciak from the cell in the Watchhouse to interview room No. 2, a distance of some 30 metres.

- Mr Lajciak was placed in interview room No. 2.
- Mr Lajciak was given the opportunity to make a telephone call and was asked if he wanted coffee or to go to the toilet.
- Constable Harris explained the procedure to be adopted on the formal record of interview and was interrupted by the accused attempting to tell his story.
- Constable Harris and Sergeant Huysse both told the accused to “save it” for the formal record of interview.
- Constable Harris obtained a cup of coffee for herself.
- Constable Harris and Sergeant Huysse left the interview room to obtain exhibits, tapes and paperwork to conduct the record of interview.
- Constable Harris and Sergeant Huysse escorted the accused to the interview room containing video facilities, a distance of 30-40 metres.
- Constable Harris unsealed the tapes and set up the video and audio facilities.
- Sergeant Huysse went to the watchhouse to obtain the accused’s glasses from his property at the Watchhouse and returned to the interview room

with the glasses after complying with requirements of the watchhouse for the removal of a prisoner's property.

On the evidence, it is not possible to quantify exactly how long each of these actions took to complete. However, it is not unreasonable to conclude that these activities filled the 19 minutes and not just a few minutes as suggested by Mr Lawrence, counsel for the accused.

I do not accept Mr Lawrence's submission that there would have been some 10-12 minutes during which Mr Lajciak responded to questions from the police officers.

I find on the evidence that at no time in this 19 minutes did police officers put questions to Mr Lajciak and that his attempts to explain his version were resisted by the police officers who told him to save his statements for the taped record of interview.

I find that in his attempts to give his version of events in interview room No. 2, Mr Lajciak got no further than to deny that there was sexual intercourse without consent and to express surprise at his wife's complaint and to refer to the fact that she had been out late.

The Crown have discharged the onus of proof upon the Crown to satisfy the court that police complied with the provisions of the *Police Administration Act*.

On these findings of fact, there is no basis for excluding the record of interview on the grounds of public policy. The case is distinguishable from the High Court decision in *Pollard v The Queen* (supra). In broad terms the facts in *Pollard v The Queen* were that police failed to caution the accused as to his rights to speak or remain silent or to advise him of his right to communicate with a friend or relative prior to interviewing him at the Frankston Police Station. He was subsequently interviewed at the St. Kilda Road Police Complex. The court found that police had proceeded to interview the accused in breach of certain provisions of the *Crimes Act 1958* (Vic). The court held that the confessional statement should have been excluded from evidence in exercise of the trial judge's discretion.

On my findings in this case, there was no such breach by police of the provisions of the Northern Territory *Police Administration Act* which contains provisions similar to the provisions of the *Crimes Act 1958* (Vic).

At the formal record of interview the accused gave lengthy and detailed answers to the police questions.

Mr Lawrence submitted that there is a potential unfairness to the accused because police were aware of Mr Lajciak's version of events before commencing the record of interview. I do not accept this submission. The police officers had ensured that Mr Lajciak went no further in his explanation prior to the commencement of a formal record of interview than a general

denial of the allegation, an expression of surprise at his wife's complaint and a statement about her being out late that night. I do not accept that this resulted in an actual or potential unfairness to the accused on his formal record of interview. Mr Lawrence further submits police did not seek to put to Mr Lajciak his earlier statements or have him confirm anything he said in the 19 minutes after he was brought from the watchhouse and before the formal record of interview and that this was potentially unfair to the accused. In view of my findings on the facts, I am not persuaded that this resulted in either a potential or an actual unfairness to the accused.

I ruled on 11 November 1998, prior to the commencement of the trial, that the record of interview was admissible on the trial of the accused.

I now publish the reasons for this ruling.
